No. 2472

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Smith-Booth-Usher Company,
Plaintiff in Error,
vs.
Detroit Copper Mining Company of Arizona,
Defendant in Error.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

EVERETT E. ELLINWOOD,
JOHN M. ROSS,
Attorneys for Defendant in Error

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BRIEF OF DEFENDANT IN ERROR

Before entering upon a consideration of the cause, we gladly take occasion to express our cordial acknowledgement of the courtesy extended us by counsel for Plaintiff in Error in the preliminary submission of their brief herein, which has accorded us a period most generous and extensive for its perusal.

SUPPLEMENTAL STATEMENT OF CASE

In order to get this case fairly to the attention of the Court, and exhibit clearly the way in which the alleged errors arose, we think a supplemental statement of the case proper.

The contract sued on was dated December 5, 1912. It provided for shipment of the gas producer within forty five

NOTE: The transcript of record is herein referred to as "Tr." giving page number. Plaintiff's brief is referred to as "P. B. ....."

(45) days (Tr. 6). Time was of the essence of the contract (Tr. 10). Shipment was made in about ninety (90) days (Tr. 16). The purchaser agreed to erect the apparatus on arrival, in accordance with the plans and specifications of the seller (Tr. 9). In pursuance of its option in that respect the seller furnished a different scrubber from that specified, but of the latest approved design (Tr. 155). Prior to that time, Plaintiff had sold four of these plants (R. 273, 279).

Installation was complete when Plaintiff's expert witness J. H. Cox reached Morenci about April 2, (Tr. 166, 167) in accordance with Plaintiff's plans and specifications (Tr. 185). It had been erected under the supervision of Plaintiff's witness, Lawrence Vorhees who left Los Angeles March 8, and was able to start the plant March 27th or 28th (Tr. 152). He had never before erected a scrubber of the character substituted by Plaintiff (Tr. 155). When he had the plant in operation he turned the gas into the holder and mains of Defendant, but turned it out because the producers would not clean the gas sufficiently (Tr. 154). He remained about seven weeks, leaving in the latter part of April, being succeeded by Mr. Cox (Tr. 154). Vorhees did not put the plant in operation, or turn it over to Defendant complete and operating (Tr. 155). But he could not see that any changes were necessary (Tr. 157).

When Mr. Cox reached Morenci April 2, the plant was not in operation (Tr. 167). He started it up but had difficulties which required him to spend eight or ten days in making various changes (Tr. 167). When these were completed during the last week of April (Tr. 167) he again attempted to operate the plant, when the gaskets between each washer and producer blew out. He then had to remove all the producers from the washers, in other words, to dismantle part of the plant (Tr. 167, 228). He did not there-

after operate the three producers simultaneously but did operate them one at a time. (Tr. 168). He left Morenci May 7, after which time no attempt was made by any one to operate the plant. The longest continuous operation of the plant during April was for twenty-four hours, each unit separately (Tr. 227). His last adjustments of the plant were completed April 25 or 26.

Meanwhile, Plaintiff had called in O. H. Ensign, the inventor of this gas producer, to advise on whatever problem had arisen (Tr. 291). He recommended the substitution of a centrifugal scrubber (Tr. 293) of a type which had not been successfully demonstrated when this contract was made (Tr. 292).

Plaintiff thereupon through Mr. Cox, asked for an extension of time (Pl. Br. p. 23). That was on May 6, five months after the contract was made. Cox was sure they could be shipped from the factory in seven or eight weeks and allowed another four weeks for the arrival of the new scrubber. (Tr. 263). Smith thought it could arrive in from eight to ten weeks, (Tr. 281) not more than ninety days at the outside. Cox had then made the gas as clean as he could with the apparatus then installed. He thought it could be used in Defendant's long pipe lines, by introducing a system of sprays and sluicing not provided by the contract or contemplated by it (Tr. 264).

Mr. Thomson, Defendant's general manager, said he would investigate the proposed new scrubber and advise whether or not Plaintiff would be given further time in which to install it. (Tr. 263). About May 27, Defendant wired Plaintiff it would go no further with the matter, in other words, that the extension of time would not be granted (Tr. 274). Cox says Defendant did not promise to install the new scrubber. (Tr. 264). Smith says the same (Tr. 281).

In view of this, it is wholly incomprehensible that Plaintiff should now claim it "was induced to lie idle" while Defendant was investigating the new scrubber (P. B. 18), or that Plaintiff should represent itself as aggrieved by Defendant's refusal to grant the desired extension.

Plaintiff states that Cox left Morenci, with Defendant's consent, "pending the purchase of a new washer with the intention of returning and continuing the tests on behalf of the Plaintiff" (P. B. 5). But Cox distinctly states the contrary saying "As far as the cleanness of the gas was concerned, I didn't expect to go back there and try to make any cleaner gas with that machinery than I had already made." (Tr. 264). Plaintiff repeatedly urges in its brief, that Defendant's refusal to install the proposed new scrubber was responsible for its inability to show that aside from the suspended matter in the gas it otherwise met the specific guarantees of the contract. This is oddly inconsistent with its specific allegation that prior to May 6, 1913, a trial run of the machinery was had and "that upon the said trial the said machinery met each and all of the guarantees specified in the said agreement," and that it performed "all of the terms and conditions of the said agreement" excepting as to time of shipment from Los Angeles, which latter default it is alleged and admitted was waived by Defendant. (Tr. 17).

Moreover, although it is alleged that Plaintiff was ready and willing to proceed with the contract (of which it claims full performance) after Defendant's alleged abandonment thereof, by refusing the requested extension of time (Tr. 17) there is not a line or syllable of evidence in the record which remotely suggests that Plaintiff ever offered to proceed any farther with the installation already made, or asked or was denied permission so to do, or which in any respect controverts the finding of the trial court:

"It nowhere appears in the evidence that defendant prevented the plaintiff or its engineer, Cox, from continuing the experiments or efforts to perfect the plant as installed or to put it in a suitable condition to meet the requirements of the guarantees." (Tr. 304).

The principal point made by Plaintiff has to do with the gas holder. The contract specified that Defendant should furnish among other things a 15,000 ft. gas holder (Tr. 8). Plaintiffs' specifications showed no connection with the gas holder. (Tr. 271). Defendant was required to and did erect the plant according to these specifications under Plaintiffs' supervision. Yet it is now urged that Plaintiff was wholly disabled to test the gas because the plant was not connected with the 15,000 foot gas holder. Let it be noted in relation to this holder that a 15,000 foot holder was specified because it happened to be there when Plaintiff was negotiating for the sale of this plant. (Tr. 270). The manufacturers' bulletin which Plaintiff alleges was part of the contract (Tr. 5-15) and which Plaintiff introduced in evidence as part of the contract (Tr. 139, 317, 327), but which Plaintiff now says was not a part of the contract, (P. B. 16) states that "a small gas holder" is a necessary auxiliary to the gas plant (Tr. 12).

Although Plaintiff alleges full performance and nowhere in its complaint suggests that Defendant's alleged failure to furnish a 15,000 foot gas holder prevented or impeded Plaintiffs' full performance, Plaintiffs' case is largely made up of such suggestions and they are repeatedly urged here. The inventor of the plant was so little interested in the holder feature that he did not care what size it was (Tr. 283). There were two holders there, one of 5,000 foot and the other 15,000 foot capacity. Vorhees persistently said the

small holder was of 1500 foot capacity (Tr. 142, 143, 156); Cox called it 5,000 feet. (Tr. 256).

Vorhees erected the small holder or installed it as part of the gas plant. (Tr. 143). He was Plaintiffs' engineer in charge of installation. He connected the gas plant with the gas main "which main was connected with the 1500 foot holder." (Tr. 143.) As already stated, no direct connection between the producer and holder was specified by Plaintiff, and Vorhees shows that none was ever contemplated. (Tr. 142). The gas holder was attached to the plant early in May (Tr. 145). Vorhees connected the producer with the mains that ran to the 15,000 foot holder. (Tr. 145). He says, "That gas main led directly into the 15,000 foot holder if the valves were open." (Tr. 152). When he erected the plant he connected the producer with the main by a pipe which he installed (Tr. 153).

On one occasion only, while Vorhees was there, about April 28 or 29 he turned the gas "into the mains of the Company, into the holder through the main," but it was quickly turned out because the plant produced too much soot. (Tr. 154). Vorhees was there seven weeks (Tr. 154). Cox speaks of one occasion when the gas was turned into the 15,000 foot holder through the main (Tr. 205). He admitted the connection with the 15,000 foot holder (Tr. 229), but he found the pipe which Vorhees had installed too small. Its capacity was about one-third that of the gas plant, but he did not change it. (Tr. 168). When we view the cataclysmic consequences of Defendant's alleged failure to furnish a 15,000 foot holder in the light of the foregoing record facts, we have a better basis for judging the decision of the trial court than is furnished by Plaintiffs' incomplete statement. When it is further noted that Plaintiff never wanted any holder except for the purpose of measuring the *quantity*

of gas produced (Tr. 169, 185, 186, 235, 272) and that no one in Plaintiffs' behalf ever suggested to Defendant that it could make cleaner gas by use of a holder or could thereby make the gas conform to the other more important guarantees of the contract, Plaintiffs' argument concerning the holder appears less ingenuous than ingenious.

While ignoring the remaining guarantees of the contract, Plaintiff devotes considerable space to an attempt to explain away the suspended matter contained in the gas produced by this plant. The contract provided that the gas should contain no suspended matter which would be *injurious to the engines or gas conducting pipes* (Tr. 8). The Bulletin which Plaintiff pleaded and proved as a part of the contract, but which it now seeks to discard, explains that.

> "It is unnecessary to clean the gas made by the Amet-Eaugin process to a greater extent *than to prevent deposits in the pipes.*" (Tr. 15).

Upon the trial, and in this Court, Plaintiffs' position was and is that clogging the "gas conducting pipes" with soot would not be injurious to them as gas conducting pipes, although as a result they might cease to conduct gas.)P. B. 18, 13, Tr., 176). By offering evidence that the soot would not corrode the iron in the pipes, Plaintiff assumes to have fully met the guaranty of the contract. That is to say a chimney may be so filled with soot as to be wholly useless as a chimney, but if the rock or brick does not disintegrate, it is not injured as a chimney. The tubes of a boiler may become so scaled that the boiler is useless as a boiler, but if its value as old iron is not impaired, it is not injured as a boiler. Even if Plaintiff had not made the Bulletin so indubitably a part of its contract, the utter absurdity and unreasonableness of its position would be too obvious for comment.

Ensign saw the suspended matter with his naked eyes. (Tr. 283). Cox says that while the soot would not injure the pipes it might clog them (Tr. 204). He admitted that when he left Morenci he had not cleaned the gas so as to prevent deposits in the pipes. He says "It couldn't be done." (Tr. 265). But he said the gas could have been used by installing a system of sprays and sluices, that such appliances "would have been necessary" (Tr. 264). Ensign testified to the same effect. (Tr. 295). Also, as we have noted, both of these experts thought the proposed rotary scrubber might get the same result if Defendant had been willing to give them ninety days more in which to get it. These facts need only to be stated to justify the conclusion of the trial court that Defendant could not be forced to supply a system of sprays or sluices or to wait ninety days for a second installation under a contract which contemplated but one. Of course if Plaintiff had a right to make a second installation, it would have an equal right to make a dozen.

ISSUES UNDER THE PLEADINGS

Plaintiff brought suit upon this contract alleging that except for the delay in shipment which was waived by Defendant it had "performed all of the terms and conditions of said agreement to be by it performed." (Tr. 17).

It further alleged that a trial run of the machinery was had from March 27 to May 6, "that upon the said trial the said machinery met each and all of the guarantees specified in said agreement." (Tr. 17).

Thereafter, according to the complaint the Defendant abandoned the contract and refused to proceed further under it, although Plaintiff was willing and ready to continue with the ninety days' trial run which had not been completed (Tr. 17). It was also alleged that although Defendant had agreed

to furnish a 15,000 foot gas holder it had not done so. (Tr. 16). There is not a suggestion in the complaint that this alleged failure on Defendant's part prevented Plaintiff from performing its contract in whole or in part. The complaint, far from alleging any excuse for non-performance positively alleges full and complete performance, as we have seen. It is alleged that owing to Defendant's abandonment of the contract, the ninety days' trial run was not completed. A second cause of action set up the common count for goods, wares and merchandise sold and delivered. Briefly, Defendant's answer (Tr. 21 et seq.) admitted its waiver of Plaintiffs' delay in shipment; denied that it had ever operated the gas plant; denied that it had failed or refused to furnish a 15,000 foot gas holder, alleging that said holder was furnished, in place, connected and ready to use whenever the gas plant was ready to be used with it; denies that upon the alleged trial run said plant met each or any of the guarantees specified in the agreement; denies abandonment of the contract on its part, and alleges abandonment on Plaintiffs' part; denies that Plaintiff was ready or willing to continue with the trial run or that it so notified Defendant; denies performance of the contract by Plaintiff; sets up the specific guarantees of the contract and alleges specifically and in detail the guarantees which were not performed (Tr. 27, 28); alleged that it asked Plaintiff to remove the plant, as provided in the contract, and denied the allegations of the second count of the complaint.

A case was thus clearly made for the application of Paragraph 431 R. S. Arizona, 1913, (1283 R. S. Arizona, 1901) reading as follows:

> "In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated

generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading shall establish on the trial the facts showing such performance."

The record amply discloses however, that throughout the trial, and in its brief in this court, Plaintiffs' principal efforts have been, and now are, directed toward showing excuse for non-performance, rather than the facts constituting the alleged performance. In the same breath it urges performances and excuse for non-performance. The record shows no request on plaintiffs' part for leave to amend its pleading to conform to this theory. Doubtless, such an amendment would have been permitted if requested, but, in the absence of it, we trust that without appearing unduly technical we may urge that this case is here upon the amended complaint and amended answer shown in the record and must be determined thereon.

ARGUMENT

Plaintiff's first assignment of error is as follows:

"POINTS"

1.

"The court erred in directing a verdict by the jury at the close of the plaintiff's case in favor of Defendant in determining all questions of fact presented by the evidence and in not allowing these issues to be passed upon by the jury." (P. B. 3)

We hasten to take issue on this assignment of error and confidently submit to the court that no possible view of the evidence adduced at the trial of this case, no possible inference to be drawn from such evidence, could under any circumstances support the contention that a question of fact

was presented, which should have been submitted to the jury.

It is obvious, we apprehend, that the written contract was the sole, absolute and unequivocal criterion of the contractual obligation of the contracting parties, and this was a contract which contained a number of specific guarantees to be performed on the part of the plaintiff.

The testimony of the plaintiffs' witnesses, we emphatically maintain thrust one irrefutable conclusion, to the exclusion of all others, upon the trial court, namely: That Plaintiff utterly failed to perform its contractual obligations under its guarantees, and in the same measure failed to show any excuse for non-performance, even if such excuse were admissible under the pleadings, which, plainly, it was not.

In order to demonstrate wherein Plaintiff failed in performance, it becomes necessary for us at the outset to meet and dispose of Plaintiff's assertion that the "Manufacturer's Bulletin" was not made a part of the contract. (P. B. 16)

We submit that the contract *in its entirety* is before the court as a part of the record, and quote as follows, from Plaintiffs' Amended Complaint:

"That on or about the 5th day of December, 1912, Plaintiff made, entered into and executed a certain agreement in writing, as follows:"

(Here appears a recital of contract from beginning to end, including the Manufacturer's Bulletin)

> "And that the above is a full and complete copy of said agreement, except that the Manufacturer's Bulletin attached to said agreement contains certain drawings, diagrams and illustrations, which it is impracticable to set forth in this complaint, and Plaintiff hereby gives

notice to defendant that evidence to prove said diagram drawings and illustrations will be introduced at the trial." (Tr. 5 and 6)

MR. SEABURY: We offer in evidence, if your Honor please, the contract which is the subject of the cause of action made between the Smith-Booth-Usher Company, and the defendant, dated at Los Angeles, September 2nd, 1912."

"MR. ELLINWOOD: It is admitted in the complaint. No objection.

"MR. SEABURY: Together with the specifications attached hereto.

"The COURT: It may be admitted. (Tr. 138, 139, 317-329)

Plaintiff having alleged that the Bulletin is a part of the contract and likewise having introduced it in evidence as a part of the contract, it is entirely clear that plaintiff is estopped to claim that the Bulletin is not a part of the contract sued upon. But, for the moment, disregarding Plaintiffs' allegations and proof upon this point, we submit that a mere casual reading of the contract will indicate that the Manufacturer's Bulletin is clearly a part thereof. We quote the first clause of the contract:

"Smith-Booth-Usher Company furnish the undersigned:

"Three (3) two hundred (200) H. P. International Amet Crude Oil Gas Producers: Lined complete with brickwork and concrete, with all piping and valves as *shown in cut on the first page of the company's bulletin hereto attached*: With scrubbers, oil pump, plans and specifications for installation." (Tr. 5)

If this clause, "as shown in cut on the first page of the company's bulletin hereto attached, "were the only mention made in the contract of "Company's Bulletin," it might appear that only the particular part of the Bulletin referred to as "cut on first page" had been incorporated into the contract.

But such is not the case. A further reading of the instrument discovers the second paragraph under head of "company's guarantee," which we quote as follows:

> "That it shall be as described in the Manufacturer's Bulletin hereto attached, or of the latest improved design." (Tr. 7).

We submit that every line of printed matter in the Bulletin is in the way of description of the apparatus contracted for; that the clause quoted from the initial paragraph of the contract sufficiently includes the diagram on page 1 of the Bulletin, and that the second paragraph of "company's guarantee" is susceptible of but one interpretation, i. e.: That it is written into the contract for the sole purpose of making Manufacturer's Bulletin a part thereof.

Starting then with this premise we first direct the attention of the court to the following statement in paragraph VI, under the head of "Company's Guarantee."

> "There will be no suspended matter contained in the gas, which will be injurious to the engines or gas conduct-pipes." (Tr. 8)

And again to the following excerpt from paragraph XIII of Manufacturer's Bulletin:

> "It should be noted, however, that for engine use, it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes." (Tr. 15).

And in the same connection, we quote from the agreed bill of exceptions:

To J. H. COX:

Q. Now, do you know from your practical experience what, if any, effect the existence of suspended matter in such quantities as you found in this particular case would have, either upon the engines or the pipes conducting the gas?"

A. It would have no ill effects upon the engines. It would have no injurious effect upon the pipe, but without a system of sluicing or cleaning the pipes, it might after a period cause the pipes to become clogged." (Tr. 204)

This was the final statement of Plaintiffs' witness on the subject of suspended matter. It was properly noted by the trial court that the contract nowhere contained any provision for installation of "a system of sluicing or cleaning the pipes."

Consequently, after reading into the first quotation from the contract, the relevant expression of the second, and keeping in mind the testimony of Plaintiff's witness, it becomes evident that the existence of "deposits in the pipes" precludes any representation of even so much as substantial performance on Plaintiffs' part.

As a necessary part of the gas producers, it was incumbent upon Plaintiff to furnish a certain scrubber (sometimes called washer). This scrubber was to be "as described in the Manufacturer's Bulletin attached hereto, or of the latest improved design." It was also to be such a scrubber as would "properly perform the duty for which it was known to be intended by the parties." (Tr. 7)

Paragraph XIII, Manufacturer's Bulletin, describes the functions of a scrubber as follows:

"After passing the first water seal, the gas goes through the usual washing or scrubbing process to remove suspended particles, the extent to which this is carried *being dependent on the subsequent use of the gas,* effective appliances for this purpose being supplied with the producers, which it is unnecessary to describe here as they are of every day use in all gas works whatever the system of gas making employed. It should be noted, however, that for engine use it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes, as there has never been a case of the slightest injury to engine cylinders from carbon with Amet-Ensign gas. Cylinders which have been in use several years are perfectly clean and show no appreciable wear." (Tr. 14)

During his sojourn in Morenci, Plaintiffs' witness Mr. Cox, modified the washer and scrubber. That these modifications were in a material degree ineffectual is disclosed by his statement made to Defendant's engineers immediately prior to his departure from Morenci.

I had a conversation on or about that date with tl ose gentlemen, as I did almost every day, but the conversation related to this—I stated that I couldn't make the gas cleaner than I was making it at that time and they insisted that the gas should be made cleaner, and I told them that they might have the privilege of trying it themselves, if they wanted to try to make it cleaner, but with the present apparatus I could make no cleaner gas than I was doing at that time." (Tr. 235)

Viewing this testimony in connection with witness' testimony as to the effect of the gas on the pipes of Defendant and the necessity of installing a system of sluicing and wash-

ing the pipes, and then laying both statements beside the following colloquy, in which Plaintiffs' attorney defines its position in regard to its proposal to install a washer such as was used in El Centro, California.

The COURT: You mean to say that this witness' propositon to these people, while maintaining that they had complied with the contract, was simply to remedy an objection which really was not well founded but simply to satisfy them?

MR. SEABURY: That is all Your Honor. (Tr. 177)

It seems that Plaintiff by its own evidence has made out a clear case of non-performance in regard to the furnishing of an adequate scrubber.

That the gas contained suspended matter which would deposit in Defendant's pipes is freely admitted by every expert witness who testified for Plaintiff, as fully appears from our foregoing "Supplemental Statement." In the original installation a horizontal scrubber was substituted for the vertical scrubber specified in the contract because, as Mr. Vorhees testified, it washed the soot and suspended matter out of the gas better than a vertical scrubber. (Tr. 158, 159). The inventor recommended still another scrubber (Tr. 293) known as a centrifugal scrubber. He frankly admits that when this plant was sold, the process of scrubbing the gas was in a somewhat experimental stage. (Tr. 292). When Cox left Morenci, he had made the gas as clean as could be done with the apparatus then installed (Tr. 240). He told Defendant that the horizontal scrubber "does not clean the gas as clean as you desire for your long pipe-lines." (Tr. 246). He admitted to Defendant's general manager, Thomson, that a system of sprays and sluicing would be necessary to remove the deposits from the pipes and permit

Defendant to operate its plant continuously. (Tr. 189). After Mr. Thomson had investigated the proposed centrifugal or mechanical scrubber he told Plaintiff that the cost of handling the soot from the gas plant would be prohibitive. (Tr. 192).

But Plaintiff conceding the deposit in the pipes, has the temerity to argue that it was permitted under the contract to make a gas which would clog Defendant's gas-conducting pipes with soot and render them useless so long as the soot did not impair the value of the pipes as old iron. The statement in the Bulletin that the gas need only be cleaned sufficiently "to prevent deposits in the pipes" is discarded as no part of the contract. The Bulletin further sets forth that the gas upon leaving the producer, "goes through the usual washing or scrubbing process, to remove suspended particles, the extent to which this is carried being dependent on the subsequent use of the gas." (Tr. 14).

But Plaintiff even refuses to consider that language in connection with the specific guaranty of the contract that the plant would "properly perform the duty for which it is known to be intended by the parties hereto." (Tr. 7). The fact, known to Plaintiff, that the gas from this plant had to be conducted through 1000 feet of pipe-line (Tr. 226) over a hill (Tr. 153) to Defendant's plant, is ignored by Plaintiff who retires behind the sole defense that the soot would not corrode or eat up the pipe-line. It boldly asserts that if Defendant wanted to use its pipe-line to conduct gas it must install a system of sprays and sluices.

We submit that under elementary rules, the construction of this contract was a question for the trial court; that it was its duty to "adopt a construction which, under all of the circumstances of the case, ascribes the most reasonable, probable and natural conduct to the parties."

Bellv. Bruen, 1 How. 169; 11 L. Ed., 168.
Hull Coal etc. Co. v. Empire Coal etc. Co., 113 Fed., 256.

It is quite manifest that the trial court's construction of this contract accords with reason and justice, and that Plaintiff has confessed that it did not perform its guarantee against suspended matter in the gas. Plaintiff urges, however, that its failure in this respect was due to Defendant's failure to furnish a 15,000 foot holder, and to Defendant's alleged abandonment of the contract. Several conclusive answers to this are,

(1) The complaint alleges complete performance, does not suggest non-performance of this guaranty or any excuse for non-performance.

(2) The 15,000 foot holder was furnished by Defendant (Tr. 152, 205).

(3) Cox testified that he could not make any cleaner gas with the apparatus then installed and left Morenci without any intention of returning to experiment further with that apparatus in cleaning the gas. (Tr. 264).

(4) No evidence whatever supports Plaintiffs' claim that it wanted to proceed further with that apparatus, or ever offered to do so, or that Defendant ever prevented it from so doing.

Therefore, as far as the "suspended matter" clause is concerned it stands as a record fact that Plaintiff wholly failed to perform that guaranty. We will now consider the other specific guaranties.

Company's guaranty number 4 reads as follows:

"The company guarantees the within described apparatus when working within 90 per cent of its normal

rated capacity of 600 H. P. and using California Asphaltum base crude oil, ranging from 14 to 18 degrees Baume, reduced to 60 degrees Fahr., containing not less than 18,500 B. T. U. per pound and weighing approximately 7.8 pounds per gallon; to deliver at least 415 cubic feet of gas of at least 190 B. T. U. low value for each gallon of said oil fired, or one (1) gallon of oil as above defined with produce 78,500 B. T. U. in heat value of gas ranging from 190 to 210 B. T. U. low value per cubic feet; the gas to be of uniform quality within range of 5 B. T. U. of determined B.

T. U. content of gas in regular operation and to be of similar analytic composition as that given in Manufacturers' Bulletin hereto attached." (Tr. 7).

The foregoing guaranty covers the heat quality, quantity and uniformity of the gas to be manufactured. Nothing could be more specific or definite. The quality of oil to be used is specified as well as its heat contents in British Thermal Units (Abbreviated B. T. U.) and its weight per gallon. The volume of gas to be produced from each gallon is specified, together with the heat contents thereof and it is provided that one gallon of oil as defined in said guaranty will produce 78,500 B. T. U. in heat value of gas ranging from 190 to 210 B. T. U. low value per cubic foot. The gas must be of unform quality within a range of five British Thermal Units of its determined content in regular operation, and must be of similar analytic composition to that set forth in the Manufacturer's Bulletin attached to the contract.

The analysis set forth in the Manufacturer's Bulletin (Tr. 14) is self explanatory. It is obviously a scientific analysis which cannot be made by guess work. Not one of the expert witnesses who testified for Plaintiff had ever made an analy-

sis of the gas produced or had any personal knowledge whatever as to whether or not it conformed with the guaranty in this respect.

Mr. Smith who testified for the plaintiff was not an engineer. He was the manufacturer of the gas plant in question (Tr. 279). Mr. Ensign, the inventor of the process made no chemical analysis or other test (Tr. 283). He merely observed the plant "by the naked eye." Mr. Cox testified that he did not know whether the gas produced by the plant in question met the foregoing guaranties as to quality or quantity. (Tr. 194). Plaintiffs' counsel then averred that they would prove that the gas was of the same quality required by the contract in every particular. (Tr. 196).

Mr. Cox then described what is known as the tell-tale test which merely consists of burning the gas and observing it. He stated that that test was not used for the purpose of making a chemical analysis, but was merely an operating test by which he could gauge the value of the gas within 10 per cent. (Tr. 200-201).

It is obvious that since the gas was guaranteed to be uniform within a range of 5 B. T. U. and was required to contain 190 to 210 B. T. U. per cubic feet, the tell-tale test would disclose nothing as to whether the guaranteed uniformity had been met. Mr. Cox said "I know there is a method absolutely of making this test in figures, but that was uncommon. It was these chemists' business to get absolutely the figures, the analysis of the gas." (Tr. 202).

Plaintiff offered to prove by Cox what he had heard Dr. Sanberg say about a test of the gas which he had made. This was properly excluded as hear-say. Plaintiff thereupon abandoned all further attempt to elicit the results of the tell-tale test even if they had been admissible (Tr. 201) and

the case was closed for plaintiff without any proof as to the heat contents or uniformity of the gas produced and without testimony as to the volume of gas produced by the generator. Mr. Vorhees testified "I did not make any kind of test for heat value. I do not know what the heat value was of the gas; only hear-say." (Tr. 157). He repeated a statement of Dr. Sanberg that "It was a very good power gas that we were making." (Tr. 146). Cox testified "I did not make a test of the horse power of the one unit of the apparatus that I installed. The test was made by the chemist." (Tr. 212).

Mr. Ensign repeated a hear-say statement made by Mr. Douglas or Mr. LeGrand to the effect that the gas produced was an ideal gas engine fuel. (Tr. 295, 296). Mr. Cox made an attempt to test the volume of gas produced by one unit by running the gas into the small holder and timing it to see how long it would require to fill it; but he could not remember what result he obtained. (Tr. 252, 256).

In view of the foregoing, it is not strange that the learned trial judge upon concluding his careful resume of the evidence used this language.

> "Then how could it be said that the plaintiff has established the facts showing that the said apparatus did meet each and all of the guaranties specified in said agreement; especially the warranty with respect to the quality and quantity of gas produced. (Tr. 303-304)."

Upon the foregoing, we submit confidently that upon the trial, plantiff wholly failed to establish that it performed each or any of the guaranties specified in the agreement sued upon.

Moreover, it is perfectly clear that the evidence offered by Plaintiff wholly fails to show performance in any degree

which would sustain the hypothesis of substantial performance.

Substantial performance by the very nature of the expression presupposes a performance of the substance of the contract. It is based upon a retention of benefits on the one hand and a materal fulfillment of the contractual obligations on the other.

The rule seems well expressed by the Circuit Court of Appeals of the Third Circuit in Bush vs. Jones, 144 Fed., 942:

> "The rule that a substantial performance of a building contract is shown if the work was complete, except as to unimportant particulars, which a reasonable allowance would enable the owner to supply and remedy, is only intended to cover the inconsiderable details of construction, which do enter into the substance of the contract, and cannot properly be extended to a material part of the work."

Moreover, a recovery is permitted only,

> "where the omissions are unsubstantial and such as the parties are presumed not to have had in contemplation when making the contract."

McElraevy & H. Co. v. St. Joseph's Home, 143 N. Y. Supp. 236.

And it is also true that

> "for plaintiff to recover as for a substantial performance it is incumbent on it to show a difference in value between the apparatus installed and the apparatus called for by the contract."

(Ibid).

It is entirely clear upon the foregoing that Plaintiff did not comply with the Arizona statute above quoted requiring

it to prove the facts constituting its alleged performance. Nor did it sustain the burden of proof imposed upon it under the pleadings.

Hannan v. Greenfield, 36 Oreg. 97; 58 Pac., 888;

Witt vs. Old Line Bankers' etc. Ins. Co., 92 Nebr. 763; 139 N. W. 639;

Richardson v. Investment Co. (Wash. 1913) 133 Pac., 773;

9 Cyc. 759.

Plaintiff, in its brief sets up as an excuse for its failure to make tests of the gas as required that it was prevented from so doing by defendant's failure to furnish a holder of the capacity required in "purchaser's guarantee."

We have already shown that plaintiff is absolutely barred by the form and condition of its pleading from showing any excuse for non-performance, having alleged full performance except as to time of shipment.

Section 1283, Chapter 2, Revised Statute of Arizona, 1901, (Paragraph 431, Chapter 5, Revised Statutes of Arizona, 1913) as above quoted, appears (verbatim) on the statute books of a number of the states, and the courts seem to have established the universal rule that excuse for non-performance cannot be shown under a plea of performance.

Cement Co. v. Ullman, 159 Mo., 235; 140 S. W., 620;

McCormick v. Jordon, 65 W. Va., 86; 63 S. E., 178;

Building Ass'n vs. State Ins. Co. 29 Ore., 569; 46 Pac., 366;

Hanan v. Goldfield, 36 Ore., 97; 58 Pac. 888;
Durkee v. Carr, 38 Ore., 189; 63 Pac., 117;
Young v. Stickney, 46 Ore., 101; 79 Pac., 345;
St. Paul Fire & Marine Ins. Co. v. Hodge, 30 Tex. Civ. App. 257; 70 S. W., 574;
St. Paul Fire & M. Co. v. Hodge, 71 S. W. 386.
List Co. v. Chase, 80 Oh. St., 42; 88 N. E., 120.

It is true that there are a number of decisions in Missouri which hold that waiver or excuse for non-performance may be shown under an allegation of performance, but in this connection it is proper to make the point that these decisions are restricted to insurance cases, and it appears in Murphy v. Ins. Co. 70 Mo. App. 85, that the Supreme Bench of that state to some extent questions even this departure from the universal rule. Justice Ellison speaks as follows on the point.

"While I recognize the fact that in several opinions it has been assumed so far as concerns insurance cases that a waiver may be proved under an allegation of performance, I do not recede from the position taken in the McNeish case. It seems to me to be a reflection on the administration of the law that without pretense of cause or excuse there should be one rule of practice applied to insurance cases and a directly opposite rule to all other cases."

In the same connection we quote from paragraph VI of plaintiff's amended complaint:

"That the trial of said machinery was commenced on or about the 27th day of March, 1913, and continued until the 6th day of May, 1913, or thereabouts; that upon the said trial the said machinery met each

and all of the guaranties specified in said agreement." (Tr. 17).

And we venture to state that the fundamental time tested rule of practice that the proof must follow the allegation retains the same efficacy in law the courts and commentators have ever accorded it.

However, at this time and for the purpose of this argument only we will ignore the point of bar to the evidence and meet plaintiff on the merits of its contention.

That there was in the possession of defendant on the premises at all times a holder of 15,000 cubic feet capacity is undisputed. The testimony of both Mr. Vorhees and Mr. Cox shows that they were aware of its existence. In fact, Mr. Cox acknowledges that the reason for incorporating in the contract the requirements of a holder of that particular capacity was because defendant already had such a holder. (Tr. 270).

That the guarantees contained in the contract were correlative and dependent and that the performance of certain of them by their very nature required the prior performance of others cannot be gainsaid. It goes without saying that unless Defendant failed to furnish a holder and unless such failure prevented Plaintiff from performing its contract, such failure would not excuse Plaintiff's non-performance. We have already seen that Defendant did furnish a 15,000 foot holder. Plaintiff did not specify any connection between the producer and this holder. Its specifications pursuant to which the plant was erected showed no such connection (Tr. 271). Plaintiffs' engineer Vorhees installed the 5000 foot holder as a part of the plant, put in a pipe connecting the producer with the gas main, which was connected with the small holder (Tr. 143). The 15,000 foot

holder was also connected with the main and therefore connected with the producer as fully as was ever contemplated by Plaintiffs' specifications (Tr. 145, 152, 229). Moreover, it fully appears that Plaintiff only wanted a holder to be used in measuring the quantity of gas produced (Tr. 169, 185, 186, 235, 272). Mr. Cox could measure the output by using one unit of the producer in connection with the 5000 foot holder, and did so. (Tr. 251). It repeatedly appears in the evidence that Dr. Sanberg made chemical tests of the gas. Therefore, every necessary test could be made without using the 15,000 foot holder, and was so made.

The following testimony of witness Cox shows that Plaintiff never reached a time when it was ready to turn its gas into the 15,000 foot holder:

> "The conversation as it related to other matters was in relation to the plant--partially to the plant that was installed. Mr. Thomson made objection to the amount of foreign matter in the gas.....contained in the gas. He said that he had been advised by his engineers that there was too much foreign matter in the gas to enable them to run continuously through long pipe lines or through pipe lines and the gas must be cleaned better than it was being done at that time."

"Q. What, if anything, did you say about that to Mr. Thomson?

"A. I told Mr. Thomson that by a system of sprays and sluicing this gas could be run through these pipe lines *and run into the holder* and would cause no interruption of the service." (Tr. 189).

In other words, Defendant had done as much in the way of furnishing the 15,000 foot holder as it was incumbent upon it to do at that time.

It is not disputed that for the purposes of preliminary experiments a smaller holder was furnished.

"Mr. Cox: I didn't ask for the small holder until it was offered to me by Mr. LeGrand. I stated to Mr. George Douglas and Mr. McDougal at that time that it would be necessary to have something, some means of measuring the *quantity* of gas." (Tr. 235).

The fact that this smaller holder was so accepted warrants the conclusion that it was sufficient for such purposes, and for the period during which it was used as well.

Just prior to leaving Morenci, Mr. Cox had a conversation with Mr. Thomson (Defendant's General Manager) concerning Plaintiff's inability to go further with the work.

"Approximately on May 6th I had a conference with Mr. Thomson at his office regarding this plant."

Q. At that time and place, did you state to Mr. Thomson that you had done everything you could in connection with the plant as it stood and there was no use of staying there longer?

A. I did state to Mr. Thomson that I was unable to furnish the gas any cleaner than I was doing at that time, and there was no use for me to stay during the interval of the engineers trip to inspect another plant."

Q. Then didn't Mr. Thomson state to you or ask you if you claimed you were making a satisfactory gas as far as the soot was concerned and you stated to him that you were not?

A. I stated to him that I couldn't make it any cleaner than I was at that time.

Q. Did you state as I have put the question to you?

A. Not exactly. No.

Q. Didn't you then say to Mr. Thomson that you wished to install a mechanical or rotary washer, which you knew would clean the gas?

A. I did. (Tr. 240)

Witness Cox admitted that he could not make the gas cleaner with the apparatus as installed but claimed that he could clean it absolutely by installing a system of washing, similar to that used at El Centro, California.

It is to be noted that when witness Cox made this acknowledgement of Plaintiff's inability to clean the gas the proposition to Mr. Thomson was not that if he had a 15,000 foot holder he could clean it, but it was if he had a different washer he could clean it. It is obvious that the failure to make the gas contracted for was caused by Plaintiff's failure to furnish a proper washer and not by alleged failure of Defendant to furnish a proper holder.

Assuming for the purpose of this argument only that Defendant did fail to furnish a 15,000 foot holder, as required by the contract, is not the foregoing testimony of Plaintiff's witness significant? Does it not show that even if Defendant did fail to perform (which we do not admit) that Plaintiff's failure to perform was in no way occasioned by it?

When Plaintiff sets up breach on Defendant's part as excuse for failure to perform, it must be such a breach as would prevent Plaintiff from performance.

Mason v. Remp, 41 S. W. 694;

Goldich v. Toelberg, 55 N. Y. Supp., 954;

Plaintiff, while claiming full performance seeks to excuse non-performance by asserting that it was not allowed the full ninety day period for experiment provided in the contract. The only mention made in the contract of a ninety

day period appears under head of "Purchaser's Guarantees," paragraphs 5 and 6. We quote:

> "To commence the operation as soon as practicable after completion of the installation and to operate same in accordance with the instructions of the Company's Engineer for a period of ninety (90) days, subject to adjustments of Gas Plant necessary to cause the machinery to give results provided for in this agreement."
>
> "At the end of said ninety (90) days' operation as herein specified, should the Purchaser fail to obtain the results in accordance with the above guarantees, when the Purchaser shall have the right to dismantle the apparatus, load such parts as were received from the Company on board cars for shipment in accordance with the Company's shipping instructions and no payment nor obligation of the Purchase Price on the part of the Purchaser will be required except that which applies to the operating Engineer and the Company shall not be liable for any claim or damage except the return of any part of the Purchase Price paid except that which might have been paid for the operating Eigineer." (Tr. 9, 10).

It will be readily discerned that this ninety day period was granted to Defendant. It was not granted to Plaintiff. It was a provision incorporated in the contract for the safeguarding of Defendant's interests. The complete installation of the plant as well as a taking over of it (by defendant) for the purpose of operation was a condition precedent to the inception of the ninety (90) day period. It is clear in the contract that paragraphs 6 and 7 by their very nature could not become operative until the plant was completely installed.

If there is one point certain in the whole transaction between Plaintiff and Defendant, it is that Defendant at no time operated the plant,--in short, the point is not in issue. It is apparent that the Plaintiff is laboring under a misconception of the contract as to the existence of any ninety (90) day period for tests accorded to Plaintiff.

Moreover, as found by the trial court and clearly shown by the record, Defendant did not stop Plaintiff's experiments or prevent its making further attempts with the plant installed. Plaintiff never wanted to try it out any further, never offered to, never was refused permission so to do.

We submit, the argument upon this point having progressed to a conclusion, that a clear failure of proof of performance on the part of the Plaintiff is made out by the evidence, and that an equally clear case of performance so far as required by the contract is established on behalf of Defendant. And we further submit that by reason of these facts, and in view of the issues made by the pleadings, Plaintiff's contention that a question of fact was presented at the trial, which should have been submitted to the jury, entirely falls to the ground. It follows that the court did not err in directing the verdict.

We cite the rule in Federal Courts regarding submission to the jury as laid down by Circuit Judge Hawkins in New York Central & H. R. R. Co. v. Difendaffer, 125 Fed. 893:

> "The rule in the Federal court is that before the evidence is left to the jury there is or may be in every case a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed; and that it is not proper to submit the case to the

jury merely because some evidence has been introduced, unless that evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence."

Commissioners of Marion Co. vs. Clark, 94 U. S., 278.

EVIDENCE AS TO OPERATION OF SIMILAR PLANTS

We quote Plaintiff's first assignment of error under point II of their brief.

"(a) Exclusion of evidence as to similar plants."

Plaintiff sought to introduce evidence as to the successful operation of plants similar to that in question in order to establish that the latter complied with the guarantees contained in the contract.

If this evidence had been admitted it would have opened the way for the introduction of evidence by Defendant tending to show the unsuccessful operation of similar plants, whereupon instead of an issue being produced there would have been presented an endless controversy as constantly diverging from the issue as the lines of a hyperbole from the vertex.

In Osborn & Co. v. Bell, 28 N. W. 841; 62 Mich., 214, an apparatus was sold with certain guarantees. Plaintiff in offering testimony to prove that the apparatus complied with these guarantees examined one of its agents as to the operation of similar machines sold in that vicinity. The court said:

"The merits of the other machines referred to were not the issue in this case, nor the manner of their working. The operation of the machine sold to the Defend-

ant and the manner in which it did the business, which it was warranted to do, was the only question then under consideration and the manner the other machines did their work did not tend to prove that the operation of the one in question was in accordance with the promises of Plaintiff. The evidence was inadmissible and was well calculated to prejudice the rights of the Defendant before the jury."

Watkins et al. v. Phelps, 130 N. W. 618; 165 Mich., 180;

Gage vs. Meyers, 26 N. W., 522; 59 Mich., 300;

Second Nat'l. Bank v. Wheeler, 42 N. W. 963;

McCormick Co. v. Cochran, 31 N. W. 561;

Altman v. Fowler, 37 N. W. 708;

Wicks Bros. v. Electric Co., 38 N. W., 299;

Brummett v. Nemo Heater Co., 177 Mass., 480; 59 N. E., 58;

Osborne v. Bell, 62 Mich., 214; 28 N. W., 841;

If Plaintiff is right in its present contention, it would have been proper for Defendant to prove defects in the gas plant at El Centro by way of showing that the Morenci plant was defective. Such evidence, of course, would have been inadmissible.

Fetzer v. Haralson, 147 S. W., 290, 295 (Tex. Civ. App. 1912.)

EXCLUSION OF GENERAL STATEMENTS OF PERFORMANCE

Plaintiff complains that the trial court sustained objections to the following questions to expert witnesses:

"Q. Now, after this apparatus of yours was installed, are you able to say whether or not it properly performed

the function of a three two hundred horse power Amet crude oil gas producer?

To which an objection was sustained upon the ground that the witness should be confined to the functions specified in the contract. (Tr. 208-211).

"Q. Now, Mr. Cox, do you know the function to which two hundred horse power International Amet crude oil gas-producers, such as was installed in this case, are usually and customarily put?

To which an objection was sustained on the ground that the customary use of such producer was immaterial and irrelevant and that testimony should be confined to the particular case under the contract. (Tr. 212).

The correctness of these rulings is challenged by Assignment of Error II (P. B. 34). The learned trial judge in disposing of this matter used this language which is unanswerable.

> "If that were true all a man would have to do when he makes guarantees, regardless of how many there are in the contract, would be simply to put the witness on the stand and ask whether or not the machinery furnished, if it be machinery, properly performed the duty for which it was sold or intended." (Tr. 211).

Earlier, in the course of the trial, Plaintiff's counsel had conceded the point thus made by the trial court, saying:

"I don't believe Your Honor, that we can say the effect of this machine was to produce gas such as required by the contract between Plaintiff and Defendant. But I do believe that he can say that we produced gas of such and such a quality, and show how he found that out." (Tr. 197).

That counsel's above quoted statement is correct, and his present argument incorrect, is apparent from the following authorities:

Fisher v. Monroe, 17 N. Y. Supp. 837;

Walshe Mfg. Co. v. W. T. Smith Lumber Co., 59 So., 455, (Ala. 1912).

Standard Fire Ext. Co. v. Heltman, 194 Fed., 400 (C. C. A.)

Culbertson v. Ashland Cement etc. Co., 139 S. W., 792; 144 Ky., 614;

Anderson Elcetric Co. v. Cleburne Water etc. Co., 23 Tex. Civ. 328; 57 S. W., 575;

Billy v. Thomas Gin-Compress Co., 33 Okl. 254; 124 Pac., 1093;

Fowler v. Delaplain, 79 Oh. St. 279; 87 N. E., 260;

The above authorities are not met by the cases cited by Plaintiff (P. B. 35). The substance of Plaintiff's position is that an expert on gas-plants should be permitted to testify as an expert upon the performance or non-performance of contracts, a subject not within the field of expert testimony. Moreover, the two questions above quoted are insufficient to support counsel's theory because they do not in any way relate to the specific contract sued upon. We submit that the court's ruling was sound.

ASSIGNMENT OF ERROR III.

"The court erred in sustaining defendant's objection to and excluding testimony offered by the plaintiff, by which plaintiff proposed to show the circumstances existing at the time the defendant refused to go on with the contract, and that plaintiff never abandoned the contract, but was ready, willing and able to, and did, perform the terms and conditions of the contract to be by it performed. For the purpose of eliciting this testimony, plaintiff propounded the following questions:"

Under this specification (Tr. 65 to 86,) appears testimony of witness Cox in regard to his conversations with Mr. Thomson and Dr. Sanberg, just prior to his departure from Morenci.

Objection was offered to the introduction of this evidence on the ground that it tended to modify the contract. Counsel for plaintiff contended that such was not the purpose of the evidence and the jury was excused until the purpose could be ascertained by the court. After hearing the testimony in question the objection was sustained. The court spoke as follows:

"The COURT: I didn't sustain it on the theory that they were not entitled to prove what was done by either of these men as agents, but as to any conversation which they may have had looking to the modification of the contract. This was objected to and I sustained the objection on the ground that the evidence would show a modification of the contract or was for the purpose of showing such modification."

The jury was recalled and the witness was interrogated.

"Q. Mr. Cox, prior to your departure from Morenci on May 7th, 1913, did you have a conversation with reference to that departure with Mr. A. T. Thompson, General Manager of the defendant company?"

"A. I did."

"Q. Will you tell us what the conversation was?"

Objection is interposed.

"The COURT: It is almost impossible for the court to tell whether that evidence will show a modification or not. If it was something that was discussed and something that had been eliminated at the time they were

discussing this apparatus or lamp black or something else, it might be admissible. The question itself is not objectionable. The objection is overruled."

"A. I had a conversation with Mr. Thomson regarding the matter of an extension of the 90 day period of the tryout of the plant." (Tr. 76, 79).

Objection was here interposed and sustained upon the ground that the matter was "wholly incompetent, irrelevant and immaterial."

Witness continued:

"The conversation as it related to other matters was in relation to the plant--partially to the plant that was installed. Mr. Thomson made objection to the amount of foreign matter in the gas--contained in the gas. He said that he had been advised by his engineers that there was too much foreign matter in the gas to enable them to run continuously through long pipes or through pipe lines, and the gas must be cleaned better than it was being done at that time."

"Q. What, if anything, did you say about that to Mr. Thomson?"

"A. I told Mr. Thomson that by a system of sprays and sluicing this gas could be run through these pipe lines and run into the holder and should cause no interruption of the service, but if he desired it cleaned better than it was being cleaned, why, I knew of an apparatus that had lately been tried or had been tried since the shipment of this plant from Los Angeles, whereby the gas could be cleaned absolutely. He agreed then to send an engineer to inspect this plant and be governed by the report of the engineer."

"MR. ELLINWOOD: That is the matter we have already talked about and we ask that that be stricken out. We would not have any objection to going into this entire matter but since it is not pleaded that we agreed that they should have an extention of time, for them to go and make a different installation, and since the issues are confined to the installation of the machinery, we object to the proposal of another and different installation being testified to."

"The COURT: Any agreement which the witness stated he had made with the engineer or with Mr. Thomson for a modification of the contract is excluded. Any conversation there with reference to the presence of suspended matter is excluded." (Tr. 80-81).

The foregoing statement by witness Cox demonstrates that the evidence, which was excluded, would either have tended to show a modification of the contract on the one hand, (which was not pleaded), or on the other hand have gone to the introduction of certain matter which admittedly was not by way of showing performance of the contract. It should be noted that the court took particular pains to exclude only such statements as would tend to show a modification of the contract and not to exclude any conversa-

It seems that Plaintiff has propounded a dilemma. If the conversation related to something done under the contract, it would be inadmissible for the reason that it tended to prove an oral modification of a written agreement not alleged in the complaint; if it related to something done outside of the contract it would be inadmissible for the reason that it did not tend to show performance of the contract, under the allegation of full performance. We submit that Plaintiff is gored by either horn of the dilemma. Likewise, it is clear that such evidence was not admissible to negative or rebut

Defendant's plea of abandonment, since such rebuttal would be out of order and no part of Plaintiff's main case.

EXCLUDED TESTIMONY CONCERNING DR. SANBERG'S STATEMENTS AND TESTS:

ASSIGNMENT OF ERROR III. AND IV. (Tr. 84, 85, 86)

The questions propounded to witness Cox and to which answers were excluded, together with other relevant portions of the testimony appear at pages 83, 84, 85, 86, and 90 of the transcript. It nowhere appears from the record what answers the witness would have made to the questions or whether or not such answers, if admitted, would have been relevant or material, or would have tended to prove any of the allegations of Plaintiff's amended complaint. Plaintiff did not make any offer, or suggest anything as to the nature of the evidence to be elicited. Rule 24, 2 (b) of this court provides, "when the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." This rule states a salutary and well established rule of practice which has been followed in many cases.

In relation thereto, we quote from the decision in Hornbuckle v. Stafford, 111 U. S., 389; 28 L. Ed., 468:

> "But in order to sustain the exception to the exclusion of the pleadings in the case of Gallagher vs. Basey, it was necessary that the exception should show what the excluded testimony was, in order that it might appear whether the evidence was material or not."

The Supreme Court of Arizona in Tietjen v. Sneed, 3 Ariz., 195, 198, discussing the same point, used the following language:

"And further it is not shown what answer would have been made by the witnesses, and we cannot assume that they would or would not have been favorable to the appellant. If the answers would have been adverse to the appellant, he would not have been injured, and cannot complain, and, if the answer would have been favorable, the record should have shown the fact to have disclosed the error The party alleging the error must establish it."

In Ladd vs. Missouri Coal etc. Co., 66 Fed., 880, decided by the Court of Appeals of the Eighth Circuit, the court used the following language directly applicable to the case at bar:

It will be observed that all that the plaintiff offered to prove was "the conversation between him and Murdock relating to the contract." This offer was not accompanied by any statement as to what that conversation was, or that it was material to any issue then being tried. The insufficiency of the exception is rendered apparent by a single consideration. If this court should reverse the case because the witness was not permitted to state the conversation, what is there in this record to show or suggest that upon another trial, when the witness is allowed to state the conversation, a single word of it will be material to the case or admissible in evidence? The offer to prove the "conversation," without some statement as to what it was, and showing its materiality, was too general to be made the foundation of a valid exception. The rule is well settled that the bill of exceptions must show the materiality of the evidence which was tendered and rejected. The evidence rejected, or a statement of what it tended to prove, must appear in the bill of exceptions."

In Myers vs. Brown, 102 Fed., 250, decided by this court, which was an action for alleged infringement of a patent, error was claimed in excluding the judgment roll in another case in which the validity of the same patent was involved. In disposing of the matter, this court said:

> "It is next urged on the part of the plaintiff in error that the court below erred in refusing to admit in evidence the judgment roll in the case of Gaskell v. Myers. It is a sufficient answer to this point to say that that judgment roll is not embodied in the bill of exceptions, nor does it appear anywhere in the record."

To the same effect:

Ariz. & N. M. R. R. Co. v. Clark, (9th C. C. A.) 207 Fed. 817;

Briggs v. Chicago etc. Ry. Co. (8th C. C. A.) 125 Fed., 745, 748;

Dresser v. Canadian Pac. Ry. Co. (7th C. C. A.) 116 Fed., 281, 285;

Laflin v. Shackleford (5th C. C. A.) 98 Fed. 372.

Moreover, aside from the foregoing, it appears that plaintiff, offered certain figures which the witness Cox had copied from certain other figures given him by Dr. Sanberg, an employee or agent of defendant (Tr. 253). Cox was in the room when the analysis was made and saw Dr. Sanberg write down the figures (Tr. 252). He understood Dr. Sanberg was chief chemist of the defendant company. Defendant's general manager said he was there for the purposes of making the test. (Tr. 84).

This showing falls far short of bringing the matter within the rule stated in Rohm v. Deig, 121 Ind. 289; 23 N. E. 141, 144, cited by plaintiff (P. B. 37), wherein the court used the following language:

"And if the agent had authority to pass upon the quality of the corn, and accept it, and he did so, it would bind the defendant."

There is no suggestion in the record that Dr. Sanberg had authority to pass upon the sufficiency of the gas plant or accept it. Similarly in McPherrin v. Jennings, 66 Ia. 622, 624, cited by plaintiff, (P. B. 37) wherein it appeared that "the agent had authority to receive the pay and deliver the team." An admission is an acknowledgment of a fact of which it is evidence only in the essence that it dispenses with proof of the fact. To be binding it must necessarily be made by the party himself against whom it is introduced or by some one having authority at the time to speak for him in the premises. It is nowhere suggested by the proof that Dr. Sanberg was authorized to speak for defendant as to the matter in question.

Auditorium Theater Co. v. Ore. etc. Co., (Wash. 1914) 137 Pac. 489, 491.

Moreover, as we have pointed out, there is nothing whatever in the record which supports counsel's statement that the excluded testimony "would have tended to prove performance of the guarantees as to the quality of the gas" or that the exclusion of the evidence was prejudicial to plaintiff (P. B. 37).

We quote Plaintiff's assignment of error, paragraph IV:

"The court erred in sustaining Defendant's objection to and excluding expert testimony offered by the Plaintiff, by which Plaintiff proposed to show the tests made of the plant in question. The reason why the test made by Plaintiff was made in the way it was made, the result achieved by the test and the difference due to Defendant's failure to furnish 15,000 foot gas holder. For

the purpose of eliciting this testimony, Plaintiff propounded the following questions: (Tr. 86)

Guarantee number IV, under head of "Company's Guarantee," Plaintiff's exhibit "A," page 319 describes the gas which Plaintiff was to furnish.

Plaintiff's witness was asked if the gas complied with this guarantee. He replied that he did not know (p. 87). Subsequently, he sought to explain why he did not know. As previously pointed out Plaintiff has pleaded full performance of the contract on its part, (Tr. 17) and at this time an attempt to introduce evidence is made by way of excuse of non-performance. That such a showing is not allowable has already been indicated. We respectfully refer the attention of the court to the argument there set forth and the cases cited.

Assignment of Error number V reads as follows:

> "The court erred in sustaining defendant's objection to and excluding expert testimony offered by the Plaintiff by which Plaintiff proposed to show the harmless effect of the suspended matter in the gas generated by the plant in question. For the purpose of eliciting this testimony, Plaintiff propounded the following questions." (Tr. 91).

Plaintiff's guarantee number V (Tr. 319) states: "There will be no suspended matter contained in the gas which will be injurious to the engines or gas conducting pipes."

Paragraph XIII of Manufacturer's Bulletin (Tr. 327) states:

> "It should be noted, however, that for engine use it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes."

We quote the testimony in full under this assignment.

To J. H. COX

"Q. Now do you know from your particular experience what, if any, effect the existence of suspended matter in such quantities as you found in this particular case, would have either upon the engine or the pipes conducting the gas?"

"A. It would have no ill effect as upon the engine. It would have no injurious effects upon the pipes, but without a system of sluicing or cleaning the pipes it might after a period cause the pipes to become clogged."

"Q. Would the removal of the suspended matter to which you have referred consist of anything except the ordinary cleansing of the pipes or place where the suspended matter deposited itself."

"MR. ELLINWOOD: We object to that. The contract and exhibit attached to it point out that this process which they are going to install should be sufficient to clean the gas so there would be no deposit in the pipes. It does not provide that there should be any sluicing of the pipes after they were put in there." (Tr. 91-92).

"The COURT: The objection is sustained."

Having shown the court that the Manufacturer's Bulletin is a part of the contract in previous argument which it is pointless to reiterate at this time, it now appears that plaintiff was bound by the contract to clean the gas so that there would be no deposits in the pipes, and it also appears that the contract did not contemplate any installation of a system of washing and sluicing such as witness mentions. It follows then that any testimony purporting to show the harmless effect of such gas upon the pipes is decidedly outside of the question, and for that reason incompetent, irrelevant and

immaterial, and not in line with a showing of performance of the contract under the allegation of full performance.

Plaintiff's assignments of error VI and VII (Tr. 92, 116) are to the admission of testimony.

This case did not go to the jury, therefore, the question of the credibility of witness Cox was not up for consideration. Under any view of this evidence, it is clear that either its admission or its exclusion could have no material effect upon Plaintiff's case, and it is equally clear that if we assume for the purpose of this argument that the evidence should have been admitted and view it in the light most adverse to Plaintiff's case, it could not constitute prejudicial error, but at most could be no more than harmless error.

> "Alleged errors, which the record conclusively shows could not have affected the decision and judgment work no prejudice and constitute no ground for reversal."
>
> Commissioner of Lake Co. v. Keene, etc., 108 Fed., 505;
> Amadeo v. Northern Assurance Co. 201 U. S., 194;
> Chicago City Ry. Co. v. Bundy, 71 N. W., 28;
> Freeman v. Dodge, 57 Atl., 884;

As to the suggestion that it was improper to cross-examine Mr. Cox as to physical conditions, topography, etc., at Morenci, touching the use to be made of this gas plant, it is only necessary to point out that upon direct examination in qualifying as an expert, Mr. Cox said that in order to know as to the operation of a gas plant it was necessary "to know that the gas was the proper kind for the purpose for which it was used" (Tr. 160). He recalled what, by the terms of the contract, was declared to be the purpose for which this apparatus was intended by the parties (Tr. 194). The apparatus was guaranteed to perform "the duty for which

it is known to be intended by the parties hereto" (Tr. 7). Cox had testified on direct examination concerning Defendant's long pipe lines, (Tr. 189) and on re-direct, that he knew the function "which the parties to that contract intended that apparatus to perform" (Tr. 212), described that function as he understood it, and stated that he participated in the negotiations leading up to the contract. Therefore, Plaintiff clearly opened the door for us to cross-examine fully as to his knowledge of the use for which this apparatus was intended.

To Plaintiff's suggestion that the credibility of Cox was not in issue we reply that we had an undoubted right on cross-examination to confront him with his prior statements in contradiction of his testimony in chief, both as going to his credibility and as laying a foundation for impeachment. It is immaterial whether the statements were oral or written.

> Chicago etc. R. Co. v. Artery, 137 U. S. 519; 34 L. Ed., 747.
>
> Toplitz v. Hedden, 146 U. S., 252; 36 L. Ed., 961;

It is clear under the holding in the Artery case, supra, Defendant was well within its rights in cross-examining Mr. Cox concerning the letter written by him to Defendant, designated as "Defendant's Exhibit 6 for identification." (Tr. 117).

Plaintiff's Assignment of Error number VIII (Tr. 125) relates to the exclusion of testimony which proposed to show the limits of authority of Mr. Cox to act on behalf of Plaintiff. For the purposes of this proceeding in error the question as to Mr. Cox authority, or the scope of his authority, is without bearing, or relevancy.

Plaintiff's Assignment of Error number IX (Tr. 126) relates to the excluding of testimony offered by Plaintiff,

which proposed to prove the second cause of action alleged in the complaint for goods, wares and merchandise sold and delivered.

That Plaintiff's position is untenable, needs no demonstration.

We invoke an application of the well settled rule of law expressed by the legal maxim *"Expressum facit cessare taci tum."*

> "Where there is a written contract to perform certain work assumpsit for work and labor done will not lie. The plaintiff must sue upon the contract so long as the parties profess to act under it."

Hawk v. Walworth, 4 Ark., 577;

Jones v. Trinity Parish, 19 Fed., 59;

Stewart & Co. v. Fulton, 184 Fed., 719;

Ballentine v. Young Wing, 146 Fed., 621;

Marshall v. B. & O. R. R., 57 U. S. 953;

Hubbard v. N. Y., B. E. & Western Inv. Co., 119 U. S., 548;

Hawkins v. U. S. 96 U. S., 607;

The question here involved is directly answered adversely to Plaintiff's contention by the Court of Appeals of the Eighth Circuit, in Barnett vs. Beggs, 208 Fed. 255, 258, wherein the maxim above quoted is specifically applied to a situation identical with that presented here. In the case at bar a written contract was declared upon by plaintiff. Defendant admitted that such contract had been made. The contract itself was admitted in evidence without objection, thereby excluding the possibility of an implied contract covering the same matter. If the existence of the express contract had been denied, or if the record left some doubt as

to whether or not Plaintiff had proven the express contract as alleged, a different case would have been presented, falling within the rules laid down in Willard vs. Carrigan, 8 Ariz. 70. Upon the record presented here it is obvious that the authorities cited by Plaintiff (P. B. 46) concerning election between counts are inapplicable.

MISCELLANEOUS

Plaintiff complains that upon cross-examination of Mr. Cox Defendant was permitted to elicit that the new gas plant was to produce gas with greater economy than the Defendant's old plant (Tr. 224, 225, P. B. 40). The Bulletin attached to the contract sets forth that the Amet-Ensign process will effect a saving of cost of at least three-fourths over a plant manufacturing gas from gasoline or distillate, and at least two-thirds over the ordinary steam plant; that these economies are in the reach of all by the installation of the Amet-Ensign process and that "this guarantee extends to the removal of the apparatus and refund of cost if not fulfilled." (Tr. 10, 11). The witness had testified on direct examination that he knew the functions which the parties intended the gas plant to perform; knew what the contract provided and had participated in the negotiations leading up to the contract. (Tr. 194, 212). Therefore the cross-examination was clearly within the scope of the direct examination.

It is also complained of that Mr. Cox was cross-examined as to statements made by him to two of Defendant's engineers (P. B. 42). This examination touched the credibility of the witness and as above shown it was prpoer as laying a foundation for impeachment. It was admitted by the court "for the purpose of going to the witness' credibility only." (Tr. 234). This is equally true of all of the cross-examination of Cox now complained of (P. B. 42, 43, 44).

Plaintiff's complaint that Cox was permitted on cross-examination to testify as to the reason for specifying a 15,000 foot holder (P. B. 44, 45) is disposed of in the same manner. Furthermore, such cross-examination was proper as touching Plaintiff's claim, not supported by the pleadings, that it was prevented from performing its contract by the lack of a 15,000 foot holder. It was also proper as enabling the Court to construe the contract between the parties.

But aside from all this, it is obvious that the matters elicited upon such cross-examination have no bearing or importance in the proceeding in error, and could only be complained of after the case had been decided by a jury. Similarly, as to the Court's exclusion of testimony as to the authority of Mr. Cox, which was wholly irrelevant to the question whether he had made statements contradicting his testimony. (P. B. 45). Moreover, on the trial, counsel disclaimed any intention to question Mr. Cox's "authority to do what he did" (Tr. 277), but indicated that the excluded testimony was in relation to "a mess of correspondence, identified but not offered in evidence" (Tr. 277). Obviously it was out of order and could only be admitted as rebuttal in the event that Defendant, as part of its case, introduced the identified documents in evidence. Also, there is nothing in the bill of exceptions to show what evidence was sought to be elicited or that its exclusion could have been prejudicial.

Plaintiff's final assignment is that the trial court erred in overruling its motion for new trial (P. B. 47). We understand that error may not be assigned upon such ruling.

Ayers v. Watson, 137 N. S. 584; 34 L. Ed. 803, 809;

Philip Schneider Brewing Co. v. American Ice Mach. Co., 77 Fed. 138.

CONCLUSION

Plaintiff concludes its brief by referring to the trial courts "Unauthorized assumption and exercise of the functions of the jury." (P. B. 48). We have searched the record and Plaintiff's brief in vain for anything in the evidence proving or tending to prove that this gas plant met the guaranties specified in the contract. Plaintiff makes but slight attempt to argue that the evidence shows performance. Its particular effort is to show excuse for non-performance. If its complaint had been drawn upon such theory an entirely different case would be presented. But since Plaintiff saw fit to allege that, except for time of delivery, it had fully performed the contract, and that the machinery upon a test run met all of the guarantees of the contract, the issue here presented is clear and specific and was correctly stated and appreciated by the trial court, namely, did plaintiff prove the facts constituting its performance of the contract? We assert confidently that the records answers this question in the negative.

Plaintiff cites numerous authorities touching the direction of verdicts (P. B. 28, 29) and quotes several California decisions on this point. We content ourselves with quoting the language of Mr. Justice Miller in Pleasants v. Fant, 89 N. S. (22 Wall.) 116:

> "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and

grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

Respectfully submitted,

EVERETT E. ELLINWOOD,

JOHN M. ROSS,

Attorneys for Defendant in Error